90-784

Supreme Court, U.S.
FILED
NOV 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

STEPHANIE KENNEDY,

Petitioner,

v.

COUNTY OF LOS ANGELES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether a county commissioner who alleges that she was formally censured and discharged from her position solely for introducing and promoting a resolution seeking to ban the dissemination of allegedly pornographic AIDS education materials in Los Angeles County public schools has stated a claim for deprivation of her rights secured by the First and Fourteenth Amendments.

2. Whether the First Amendment's proscription of patronage sanctions recognized in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507, and *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990) (Nos. 88-1872, 88-2074) applies to public officials serving on independent advisory commissions created to serve the public interest.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Deane Dana, Dolores I. Nason, Fred Cohen, James Micky Dunlap, Jr., Harold L. Alterman, Susan Fetters, Hazel Geisbauer, Dr. Charles Greene, and Kenneth A. Morris, were defendants-appellees in the action below.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Stephanie Kennedy petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, in this case.

OPINIONS BELOW

The unpublished order of the Supreme Court of California denying a petition for review is set forth at App. 1. The unreported opinion of the Court of Appeal is set forth at App. 2. The order of the Superior Court sustaining Respondents' demurrer without leave to amend appears at App. 14.

JURISDICTION

The judgment of the Court of Appeal was entered on May 24, 1990. A timely petition for review was denied by the Supreme Court of California on August 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United State Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

1. In May, 1987, Stephanie Kennedy was a member of the Los Angeles County Commission on Obscenity and Pornography ("Commission"), who was officially censured and dismissed from the Commission by her governmental superiors for introducing and promoting a resolution seeking to ban pornographic AIDS education materials which were being distributed in Los Angeles County public schools.[1]

The Commission was created in 1968 to assist various county entities "in their campaign against publication and distribution of allegedly indecent and pornographic literature" Los Angeles County, Cal., Code § 3.44.060, as well as to "assist county representatives in obtaining effective state legislation in the area of pornography and obscenity" and to "enlist public support for legislative programs designed to regulate publishers and vendors of obscene and indecent writings." *Ibid.*

The Commission consists of 15 members, *id.* at § 3.44.020, who are appointed by and serve at the pleasure of the Board of Supervisors. *Id.* at §§ 3.44.020, 3.44.030. Each member serves for a term of one year, but may be appointed to additional terms. *Id.* at § 3.44.030. Petitioner was first appointed to the Commission in February, 1984, by Los Angeles County Supervisor Deane

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[1] This case comes to the Court in a preliminary posture, with both the trial court and Court of Appeal having sustained Respondents' demurrer to the entire complaint without leave to amend. Accordingly, all facts are based upon the allegations contained in the First Amended Complaint, which is set forth at App. 18.

Dana, who re-appointed her to additional terms in 1985, 1986, and 1987.

Commission members are paid for each meeting which they attend, *id.*, and are entitled to travel expenses as well. *Id.* at § 3.44.050. At the time of her dismissal from the Commission, Petitioner received $25.00 per meeting, plus expenses.

The events culminating in Petitioner's censure and dismissal began at a regularly scheduled meeting of the Commission on May 28, 1987, when Petitioner introduced an "emergency resolution" calling upon county officials to halt the distribution of allegedly obscene AIDS education materials being used in Los Angeles County public schools. Prior to the meeting, Petitioner had notified various religious and civic organizations, as well as the media, that the resolution was to be introduced, and after introducing and speaking on the resolution, representatives of those organizations were called upon to speak.

The "emergency resolution" was passed by the Commission at its next meeting on June 25, 1987, although Petitioner was not present. At the same meeting, the Commission met in closed executive session, and, without prior notice to Petitioner, officially censured her for introducing and speaking on the resolution, and for promoting the resolution by inviting interested organizations, as well as the media, to attend the meeting.[2]

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[2] The censure action is authorized by the "Representation" section of the Commission's Operating Rules, which provides as follows:

(Continued on following page)

Under pressure from Petitioner and her attorney, the censure action was subsequently rescinded by the Commission on July 23, 1987. However, on the following day, July 24, Petitioner was dismissed from the Commission by Respondent Dana, which Petitioner has alleged in her complaint was in retaliation for her activities in conjunction with the AIDS education resolution.

2. Petitioner filed suit against the County of Los Angeles, Supervisor Deane Dana, and eight members of the Commission who voted for the censure, for declaratory and injunctive relief and damages. Following a demurrer by Respondents, Petitioner filed a first amended complaint seeking declaratory and injunctive relief and damages for deprivation of her rights to freedom of speech, association, and due process of law under both the federal and state constitutions.

In sustaining Respondents' demurrer to Petitioner's action without leave to amend, the trial court stated, *inter alia*, that freedom of speech and association, as applied to appointed officials such as county commissioners, "is an interesting academic exercise, but that's really all it is. It's

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(Continued from previous page)

> It shall be the policy of this Commission that no Commissioner as a representative of the Commission will engage in a personal dispute in public about any other member of this Commission or any issue being discussed by the Commission. There are, and will continue to be, differences of opinion on the myriad of issues the Commission considers and that is as it should be. Such behavior will be subject to censure by the Commission.

App. 39.

really a tempest in a teapot, the whole thing." RT 2. The trial court thus sustained Respondents' demurrer in its entirety without leave to amend, reasoning that because the censure action was subsequently withdrawn Petitioner had no cause of action against the commission members or the County for violation of her constitutional rights, and that because Petitioner lacked a "property interest" in her position as commissioner, and was not "stigmatized" by either the censure or dismissal, her constitutional rights had not been violated. App. 16 - 17.

3. On appeal, Petitioner challenged each aspect of the trial court ruling as contrary to the First and Fourteenth Amendments. Specifically, Petitioner argued that she had a constitutionally protected right to introduce and speak on the AIDS education resolution, and to invite interested persons and organizations, as well as the media, to attend the publicly held commission meeting, without fear of punishment or retaliation by her governmental superiors.

The Court of Appeal upheld the trial court ruling. With respect to the censure action, the court found that the "Representation" section of the Commission's Operating Rules was constitutional, and that because the censure action was ultimately rescinded – albeit under pressure – Petitioner's constitutional rights were not violated. Regarding Petitioner's dismissal from the Commission, the Court of Appeal acknowledged that Petitioner had met the technical requirements for pleading a cause of action under 42 U.S.C. § 1983. However, notwithstanding that recognition, the court held that Petitioner was a political appointee subject to the vagaries of the political patronage system who could be dismissed at will by her

governmental superior, even if her First Amendment rights were abridged.

REASONS FOR GRANTING THE PETITION

This Court has often stated that speech on issues of public concern occupies the "highest rung of the hierarchy of First Amendment values" and merits "special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Such speech is the "essence of self-government" *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), which "can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest basis for exceptions." T. Emerson, *Toward a General Theory of the First Amendment* 19 (1966).

The opinion of the California Court of Appeal denigrates these fundamental values, and thus provides an important opportunity for this Court to reaffirm the principle that debate on public issues – such as AIDS education in the public schools – must "be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1970). Indeed, if allowed to stand, the Court of Appeal opinion will strip an entire class of public servants of their constitutional rights to freedom of speech and association, at great expense to the communities which they have been entrusted to serve and inform.

I. THE CENSURE ACTION AND DISMISSAL VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

Central to the present controversy is Petitioner's right of political expression. "The maintenance of the

opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of our Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 238 U.S. 359, 369 (1930). Consequently, the First Amendment "affords the broadest protection to such political expression in order 'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). This right, moreover, extends not only to ordinary citizens, but to political representatives, such as Petitioner, as well. "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966).

In dramatic contrast to this fundamental principle is the "Representation" section of the Commission's Operating Rules, which prohibits any member of the Commission from engaging "in a personal dispute in public about any other member of the Commission or any issue being discussed by the Commission," and subjects any member violating this provision to formal "censure." By its express terms, the rule prohibits all public speech by county commissioners which disagrees with the position of any other commissioner, or with any issue being discussed by the Commission. The rule is thus framed in sweeping terms which suppresses an entire category of speech, regardless of its importance to the community.

Although the trial court found that the rule had "the effect of limiting members' rights of free speech and definitely had a chilling effect on free speech" App. 16, the Court of Appeal found it to be a "reasonable restriction[] on the conduct of [commission] members." App. 10. The court stated:

> Notwithstanding the weighty policies underlying the First Amendment, we find it difficult to conceive that this rule somehow discourages the exercise of any constitutional right. This is particularly true since it does not limit the content of a Commission member's speech, but only restricts the manner (i.e. place) in which it is delivered. Contrary to the impression plaintiff attempts to create, members are not prohibited from expressing their opinions on important issues, but merely from engaging in personal disputes with other members in public. The restriction so imposed simply is not one of constitutional magnitude.

App. 10 - 11 (footnote omitted).

This ruling is seriously flawed. Although the Court of Appeal seeks to classify the regulation as a time, place and manner restriction which prohibits certain categories of speech from being discussed in public, but presumably allows such topics to be discussed privately, the regulation is nonetheless a content-based restriction on protected expression. Indeed, "[t]he principle inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it contains." *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2754 (1989) (No. 88-226); *see Clark v. Community for Creative*

Non-Violence, 468 U.S. 288, 295 (1984). It matters not, moreover, that the government remains neutral in a political controversy, and seeks only to exclude or prohibit a specific subject matter. The "First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1987).

Thus, in *Boos v. Barry*, 485 U.S. 312 (1988) (opinion of O'Connor, J.), the Court struck down a District of Columbia provision which prohibited picketing within 500 feet of a foreign embassy when the message on the sign subjected the foreign government to "public odium" or "public disrepute." *Id.* at 315. In finding the regulation content-based, the Court noted:

> Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, such as favorable speech about a foreign government or speech concerning a labor dispute with a foreign government, are permitted.

Id. at 318-19.

In the same way as the District of Columbia regulation, the restriction here prohibits an entire category of speech – that which is critical of other commissioners or any *issues* being discussed by the Commission. The rule is not narrowly tailored to prevent disruption or impairment of the public service, nor to curtail violent or unlawful conduct. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568-70 (1968). Rather, the rule is aimed directly at the content of speech, and proscribes, without qualification,

all unfavorable or critical comments. Thus, the "Representation" section of the Commission's Operating Rules has as its "primary impact" *Boos*, 485 U.S. at 321, the message being conveyed by the speaker, and cannot be permitted to stand.

II. THE COURT OF APPEAL OPINION UPHOLDING PETITIONER'S DISMISSAL FROM THE COMMISSION INSULATES AN ENTIRE CLASS OF PUBLIC OFFICIALS FROM THE PROTECTIONS OF THE FIRST AMENDMENT.

The Court of Appeal recognized Petitioner as a "highly motivated and well-intentioned individual who enjoyed the confidence of her supervisor and who had served with distinction on the Commission for a substantial period of time." App. 12. The court also acknowledged that "from a purely semantical standpoint, plaintiff's pleading against Supervisor Dana contains the requisite language to plead a violation of section 1983." *Id.* Nonetheless, the court held Petitioner to be a political appointee subject to the unqualified power of her governmental superior to "appoint, reappoint, refuse to appoint, not to reappoint, or remove an individual as he sees fit without risking a suit for damages under any theory." *Id.*

This holding is "inimical to the process which underscores our system of government" *Elrod v. Burns*, 427 U.S. 347, 357 (1976), and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972) cert. denied, 410 U.S. 928 (1973). By subjecting county commissioners to the obliquities of the political

patronage system – a system which this Court has criticized as "decidedly impair[ing] the elective process by discouraging free political expression by public employees" *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2737 (1990) (Nos. 88-1872, 88-2074) – the Court of Appeal has misperceived the limits of the political patronage system as applied to public servants such as Petitioner.

In *Elrod*, for example, the Court held that a newly elected Democratic Sheriff could not properly replace certain office staff with members of his own political party "when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." 427 U.S. at 351, and 373 (plurality opinion) and 375 (Stewart, J. with Blackman, J., concurring in judgment.) Because "political belief and association constitute the core of those activities protected by the First Amendment," *id.* at 356, the plurality held that conditioning public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association." *Id.* at 359.

Four years later, in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court held that the First Amendment prohibited a newly appointed public defender from discharging assistant public defenders who did not have the support of the Democratic Party. Rejecting the argument that a constitutional violation was engendered only when the government official had attempted to coerce employees to change political parties or had dismissed them on the basis of their private political beliefs, the Court concluded that a public employee need only prove that they were discharged because they were not affiliated with or

sponsored by the Democratic Party in order to establish a constitutional violation. *Id.* at 577.

Rutan extended the holdings of *Elrod* and *Branti* to governmental actions falling short of actual dismissal, such as "promotion, transfer, recall, or hiring decisions." 110 S.Ct. at 2734. Emphasizing the critical relationship between freedom of speech and association and the democratic process, the Court stated that the "First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Id.* at 2738.

Elrod, *Branti*, and *Rutan* thus establish that while political patronage may sometimes be applied on the basis of party affiliation, it may only include those high-ranking, confidential officials whose loyalty is essential to "the effective performance of the public office involved." *Branti*, 445 U.S. at 518. For example, where the public official is responsible for writing speeches, explaining the appointing politician's views to the public or press, or communicating with the legislature, political patronage may validly be applied. *Id.* However, short of these limited circumstances, public officials may not be discharged solely on the basis of their political beliefs and loyalties.

This is certainly the situation here. As an initial matter, both the California Constitution and Election Code provide that county supervisors shall be elected on a nonpartisan basis. Cal. Const. art. 2, § 1; Cal. Elec. Code § 37 (West 1977). Thus, party affiliation has no bearing on the appointments which supervisors make to the various commissions, and has little discernible impact on the

ability of county commissioners to discharge their "governmental responsibilities." *Branti*, 445 U.S. at 518.[3]

The Court of Appeal opinion is thus inapposite to Petitioner's status, and is directly contrary to the fundamental principle that an individual may not be disciplined or discharged for expressive conduct protected by the First and Fourteenth Amendments. *Perry v. Sinderman*, 408 U.S. 593, 597-98 (1972); *Pickering*, 391 U.S. at 574-75. The relevant inquiry is not, therefore, the political status of the plaintiff, as suggested by the Court of Appeal, but rather whether the government official *intended* to retaliate for the exercise of First Amendment rights. Thus, the First Amendment protects state employees not only from patronage dismissals, but even from an act of retaliation as trivial as failing to hold a birthday party for a public employee when intended to punish her for exercising her free speech rights. *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)

This conclusion, moreover, applies regardless of whether Petitioner had a contractual or statutory right to her position.

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[3] Indeed, Petitioner was not charged with carrying out or implementing Supervisor Dana's political agenda through the Commission, but rather was appointed for a converse reason – to assist *other* public officials such as "the district attorney, the sheriff, the county counsel, and the Superintendent of Schools in *their* campaign against publication and distribution of allegedly indecent and pornographic literature in this county." Los Angeles, Cal., County Code 3.44.060 (emphasis added). Thus, Petitioner's political status had no bearing on the performance of either her, or Dana's, governmental duties.

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Perry, 408 U.S. at 597.

Thus, in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), an untenured teacher, having been discharged from his employment, brought an action against his former employer for reinstatement and damages, claiming that the school district's refusal to rehire him was in retaliation for the exercise of his First Amendment rights. The Court held that the teacher could establish a claim for reinstatement for violation of his constitutional rights if he could demonstrate that the decision not to reinstate him was made by reason of his expressive activities.

> Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms.

Id. at 283-84.

The rule is thus clear: whether one be a fully tenured or salaried governmental employee pursuant to contract or state law, or whether one be a volunteer serving at the pleasure of the appointing authority, an individual may not be disciplined or discharged for expressive conduct protected by the First and Fourteenth Amendments. Petitioner has thus stated a cause of action for retaliatory dismissal which should have been recognized by the courts below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 14, 1990

APPENDIX 1

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Two,
No. B040833 S016371
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

FILED AUG 16 1990

STEPHANIE KENNEDY, Appellant

v.

COUNTY OF LOS ANGELES Et Al., Respondents

Appellant's petition for review DENIED.
The request for an order directing publication of the opinion is denied.

PANELLI

Acting Chief Justice

APPENDIX 2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STEPHANIE KENNEDY, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, etc., el [sic] al., Defendants and Respondents.	No. B040833 (Super. Ct. No. C690283) FILED MAY 24 1990

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Jerry K. Fields, Judge. Affirmed.

David M. Liberman for Plaintiff and Appellant.

De Witt W. Clinton, County Counsel for the County of Los Angeles and Owen L. Gallagher, Principal Deputy County Counsel for Defendants and Respondents.

After her dismissal from the Los Angeles County Commission on Obscenity and Pornography (Commission) by Supervisor Deane Dana (Dana), a member of the Los Angeles County Board of Supervisors, plaintiff Stephanie Kennedy initiated this civil rights action (42 U.S.C.

§ 1983) against the county, the Commission, and Dana, alleging that her discharge was in retaliation for the exercise of her rights to free speech and association under the First Amendment. The trial court sustained defendants' demurrer without leave to amend and dismissed the complaint.[1] This appeal follows. We affirm.

On appeal from a judgment entered after the sustaining of a general demurrer, this court must assume the truth of all properly pleaded allegations of the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1076-1077.) Those allegations must be liberally construed with a view to attaining substantial justice among the parties. (Code Civ. Proc., § 452; *King v. Central Bank* (1977) 18 Cal.3d 840, 843.) Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory. (*Katona v. County of Los Angeles* (1985) 172 Cal.App.3d 53, 56; *Surina v. Lucey* (1985) 168 Cal.App.3d 539, 541.)

With these principles in mind, we set forth the facts as alleged in the first amended complaint.

Plaintiff was first appointed to the Commission by Supervisor Dana in February 1984. The Commission itself was created by the Board of Supervisors in 1968 to assist various county agencies and officials "in their campaign

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[1] Although defendants' demurrer for some reason conceded that plaintiff stated a valid cause of action against Supervisor Dana for violation of her First Amendment rights, the trial court apparently ignored that concession and concluded that the complaint as a whole could not stand.

against the publication and distribution of allegedly indecent and pornographic literature." (Los Angeles County Code, § 3.44.060.) The Commission also is empowered to "assist county representatives in obtaining effective state legislation in the area of pornography and obscenity" (*ibid.*), and to "enlist public support for legislative programs designed to regulate publishers and vendors of obscene and indecent writings." (*Ibid.*)

The Commission consists of 15 members, with each of the five county Supervisors appointing three members from his or her respective supervisorial district. Each member serves a one-year term expiring on May 4th, "subject to the right of the board to remove any member at its pleasure." (§ 3.44.030.) Members may be appointed to additional terms, as was plaintiff in 1985-1986, 1986-1987, and 1987-1988.

At a regularly scheduled meeting of the Commission on May 28, 1987, plaintiff introduced an "emergency resolution" calling upon various local officials to stop the distribution of allegedly obscene AIDS education materials then being used in the Los Angeles public schools. In attendance at that meeting were representatives of various civic organizations and reporters from the local media, all of whom had received advance notice of plaintiff's plan to introduce the resolution. After speaking on the issue, plaintiff urged those who supported her position also to voice their concern.

Although the Commission agreed as a whole that the AIDS materials were obscene, it objected "to plaintiff's effort to focus media attention on the issue, and plaintiff's actions in inviting representatives from various

interested organizations to attend the public meeting." As a result, the Commission postponed any action on the resolution until the following month.

When the Commission reconvened on June 25, 1987, it adopted the emergency resolution and referred the matter to the Board of Supervisors. Although plaintiff was not present, the Commission then met in closed executive session and officially censured her for introducing the resolution and "for inviting representatives of concerned citizens groups, as well as the media, to attend, participate in, and report on consideration of the issue. . . ."[2] Plaintiff first learned of this action on July 11, 1987, from Burton Arrington, a member of the Commission who had opposed the censure from the outset. As a result of his opposition, the President of the Commission, Dolores Nason, ultimately referred the issue to County Counsel. In a memorandum dated July 17, 1987, that

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[2] In censuring plaintiff, the Commission purportedly sought to enforce that portion of its internal "operating rules" which provide:

"Representation

" . . .

"It shall be the policy of this Commission that no Commissioner as a representative of the Commission will engage in a personal dispute in public about any other member of this Commission or any issue being discussed by the Commission. There are, and will continue to be, differences of opinion on the myriad of issues the Commission considers and that is as it should be. Such behavior will be subject to censure by the Commission."

agency recommended that the censure action be reconsidered at the Commission's next public meeting. The Commission subsequently agreed and placed the matter on its agenda for July 23, 1987.

On that date, plaintiff's attorney, Harland Arnold, appeared at the meeting and demanded that the censure be rescinded "as though it never happened, and declare[d] . . . null and void." After debating the issue, the Commission ultimately agreed with plaintiff's position and rescinded its earlier action. The following day, however, Supervisor Dana dismissed plaintiff from the Commission for allegedly "introducing and speaking on the AIDS resolution, and for providing interested organizations and the media with an opportunity to also speak on and report the issue." Plaintiff later commenced the instant litigation.

In order to maintain a cause of action under 42 United States Code section 1983[3], plaintiff must establish that (1) defendants acted under color of state law, and (2) that this conduct deprived her of a right secured by the federal Constitution. (*Parratt v. Taylor* (1981) 451 U.S. 527,

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[3] 42 United States Code section 1983 provides in pertinent part as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

535-537; see also *Payne v. Meese* (1985) 172 Cal.App.3d 392, 404; *Green v. Obledo* (1984) 161 Cal.App.3d 678, 682.) The trial court in our case concluded that plaintiff's allegations failed to meet the second of these two elements because she held "no property interest in the appointment as a commissioner and therefore has no standing to complain" and because "the commission's censure was rescinded."

Until the 1950s, the constitutional prohibition against abridging the freedom of speech was not generally thought to limit a governmental entity's power to curb the tongues of its own employees – at least where the employees wanted to remain on the payroll. "The petitioner may have a constitutional right to talk politics," as Justice Holmes observed in a widely quoted Massachusetts case, "but he has no constitutional right to be a policeman." (*McAuliffe v. Mayor, etc. of City of New Bedford* (1892) 29 N.E. 517.) In the past three decades, however, the United States Supreme Court has made it clear that most public employees are protected from retaliation for the exercise of their constitutional rights. (*Rankin v. McPherson* (1987) 483 U.S. 378; *Connick v. Myers* (1983) 461 U.S. 138; *Perry v. Sindermann* (1972) 408 U.S. 593; *Pickering v. Board of Education* (1968) 391 U.S. 563.) This holds true even though the employee may have no protected property interest in his or her position. "It is now well-settled that even a probationary public employee or one serving at the pleasure of the appointing authority may not be dismissed from his employment for the exercise of constitutional rights. . . . " (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 778; see also *Mt. Healthy City Board of Ed. v.*

Doyle (1977) 429 U.S. 274, 283; *Perry v. Sindermann, supra,* 408 U.S. at pp. 597-598.)

A public employee who claims a denial of constitutional rights has the initial burden of pleading and proving that (1) his or her conduct was constitutionally protected, and (2) this protected conduct was a "substantial" or "motivating" factor in the government employer's decision to impose some form of disciplinary action. Once the employee has carried this burden, the public employer may show, by a preponderance of the evidence, that it would have made the same decision in the absence of the protected conduct. (*Mt. Healthy City Board of Ed. v. Doyle, supra,* 429 U.S. 274, 287; *Shimoyama v. Board of Education* (1981) 120 Cal.App.3d 517, 524.)

Viewed in light of these principles, we think it clear that plaintiff has no cause of action under section 1983 because of her purported "censure." Even if the Commission was motivated in the first instance by an intent to punish plaintiff for speaking out on the AIDS issue, it eventually reconsidered its position and rescinded the censure. Said another way, the Commission did exactly what plaintiff requested – it afforded her a full hearing on the issue and then voted to revoke its earlier action. Under the circumstances, plaintiff may not now complain that the censure somehow deprived her of any right guaranteed by the First Amendment. This is especially true since the complaint fails to allege any causal connection between the censure and plaintiff's subsequent dismissal or any other resulting harm. An action under section 1983 envisions some real and appreciable impact upon a right secured by the federal Constitution. Here, there was no restraint placed on plaintiff's conduct and

any disability resulting from the censure was removed when the Commission rescinded its action. Although the First Amendment is implicated whenever a government employee is disciplined for the exercise of permissible free speech, in this instance the "discipline" imposed by the Commission was withdrawn and plaintiff's rights were fully vindicated. Simply put, plaintiff, faced with the censure, fought for her rights and, in this instance, won. There was no deprivation of a protected right sufficient to state a cause of action under section 1983.[4]

Turning now to the county's liability under section 1983, we conclude as a matter of law that the allegations of the first amended complaint are insufficient to support a civil rights action against that governmental entity. In order to plead a section 1983 claim against governmental defendants for the tortious conduct of employees under federal law, it is necessary at a minimum to allege the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. (*Oklahoma City v. Tuttle* (1985) 471 U.S. 808, 817; *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 690-691; *Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 569.) The statute does not, however, "impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee

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[4] For similar reasons, plaintiff may not maintain a cause of action for denial of due process against the Commission. She was afforded all the process that was due when that body reconsidered its position and rescinded the censure.

relationship." (*Monell v. New York City Dept. of Social Services, supra,* 436 U.S. at p. 692.)

Here, plaintiff alleges that the Commission's operating rules, and in particular the "representation" portion of those rules (*ante,* fn. 2), establishes an official county policy which, when executed by Supervisor Dana, deprived her of her constitutional rights. As we see it, however, the rule simply does not rise to the level of "official" policy necessary to establish a cause of action under section 1983. The sole purpose of the Commission is to advise the Board of Supervisors on matters relating to obscenity and pornography; it clearly has no power to set or define county policy on any issue whatsoever. Although the Commission is empowered to adopt regulations for the internal conduct of its meetings, these procedural rules cannot be said to represent the type of "official" county policy envisioned as a prerequisite to an action under the federal statute. Moreover, the complaint fails to allege that these rules were promulgated, encouraged, or ratified by the Board of Supervisors as the governing body of the county.

In any event, the rule at issue here is plainly not unconstitutional on its face. The Commission, like any other advisory body, may impose reasonable restrictions on the conduct of its members. Notwithstanding the weighty policies underlying the First Amendment, we find it difficult to conceive that this rule somehow discourages the exercise of any constitutional right. This is particularly true since it does not limit the content of a Commission member's speech, but only restricts the manner (i.e., place) in which it is delivered. Contrary to the impression plaintiff attempts to create, members are not

prohibited from expressing their opinions on important issues, but merely from engaging in personal disputes with other members in public. The restriction so imposed simply is not one of constitutional magnitude.[5]

Next, we consider the action against Supervisor Dana as an individual. It seems clear that this litigation was in actuality precipitated by his decision to remove plaintiff from the Commission.

There appears to be no question but what plaintiff's introduction of the AIDS issue at the Commission's meeting may be "fairly characterized as constituting speech on a matter of public concern." (*Connick v. Myers, supra,* 461 U.S. 138, 146.) Further, it appears that plaintiff's conduct in raising the issue in the manner in which she did was what motivated Supervisor Dana in removing her from the Commission.

Balanced against plaintiff's interest in speaking on these matters is the county's interest " 'in promoting the efficiency of the public services it performs through its employees.' " (*Rankin v. McPherson, supra,* 483 U.S. 378, 388.) The focus of this inquiry is on whether the protected conduct disrupts "the effective functioning of the public employer's enterprise." (*Ibid.*) Factors to be considered include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes

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[5] Since we have found that plaintiff has no federal cause of action against the county or the Commission, it necessarily follows that she has no state law claim against either entity.

the performance of the speaker's duties or interferes with the regular operation of the enterprise." (*Ibid.*)

While it may be said that from a purely semantical standpoint, plaintiff's pleading against Supervisor Dana contains the requisite language to plead a violation of section 1983, it still must be viewed in the light of common sense and the background of the cases interpreting the statute. All of those latter cases dealt with what could be considered rank and file employees – not persons in policy-making positions (see *Young v. County of Marin* (1987) 195 Cal.App.3d 863), nor persons whose positions necessarily served as extensions of the policies of the appointing authority.

Here, plaintiff was undoubtedly a highly-motivated and well-intentioned individual who enjoyed the confidence of the supervisor and who had served with distinction on the Commission for a substantial period of time. Her success in obtaining the approval of her resolution testifies to that.

On the other hand, her membership on that Commission was as a result of an appointment by a high-level, elected official and her presence on the Commission was an extension of that official's office and his policies. Hence, she necessarily served at the supervisor's "pleasure."

If that latter phrase is ever to have any meaning, it must, in this context, mean that as concerns the Commission, the supervisor can appoint, reappoint, refuse to appoint, refuse to reappoint, or remove an individual as he sees fit without risking a suit for damages under any theory.

The judgment is affirmed.

NOT FOR PUBLICATION.

/s/ Compton, J.
COMPTON

We concur:

/s/ Roth, P.J.
ROTH

/s/ Fukuto, J.
FUKUTO

APPENDIX 3

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY(S)

ATTORNEY(S) FOR	)	FILED
	)	FEB 10 1989
	)	FRANK S. ZOLIN,
	)	County Clerk
	)	/s/ B.J.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

STEPHANIE KENNEDY	)	CASE NUMBER
PLAINTIFF(S)	)	C 690 283
VS	)	ORDER OF DISMISSAL
COUNTY OF LOS ANGELES, ET AL	)	
DEFENDANT(S)	)	

Good cause appearing therefor, the above entitled action is hereby dismissed under the provisions of Section 581(F)(1) of the Code of Civil Procedure as to DEFENDANTS, COUNTY OF LOS ANGELES, DEANE DANA, DOLORES I NASON, FRED COHEN, JAMES DUNLAP, HAROLD ELTERMAN, SUSAN FETTERS, HAZEL GEISBAUER, DR. CHARLES GREENE, AND KENNETH MORRIS

It is further ordered that SAID DEFENDANTS have and recover costs against the PLAINTIFF in the sum of $___

DATED: FEBRUARY 10, 1989

/s/ Jerry K. Fields
Judge

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117 760718 (Rev. 5-80) 6-81
RC057 ORDER DISMISSAL

APPENDIX 4

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 21

DATE 12/23/88	)	B JEW
HONORABLE	)	DEPUTY CLERK ___
Jerry K. Fields	)	___
JUDGE	)	J WUNNO
HONORABLE JUDGE	)	Reporter
PRO TEM	)	
N GALLEGOS/CT ATT	)	(Parties and counsel
Deputy Sheriff	)	checked if present)

9:00 am	Counsel for
C690283	Plaintiff
Stephanie Kennedy	D. LIBERMAN (X)
vs.	Counsel for
County of Los Angeles, et al	Defendant
	COUNTY COUNSEL
170.6 HINZ	O. GALLAGHER (X)

NATURE OF PROCEEDINGS.

DEMURRER OF DEFENDANT, COUNTY OF LOS ANGELES, ET AL., TO FIRST AMENDED COMPLAINT

Although the court agrees that the portion of the operating rules governing the conduct of commission business which is before the court, specifically the "Representation" section has the effect of limiting members' right of free speech and definitely has a chilling effect on free speech. However, here the censure was rescinded and plaintiff therefore has no basis to complain, except in the abstract. Such a complaint will not support a cause of

action against the commission or its members, or the county for their actions.

As regards Dana's action in terminating plaintiff, it is clear that plaintiff has no property interest in the appointment as a commissioner and therefore has no standing to complain and has no right to due process, inasmuch as plaintiff has not been "stigmatized" as regards her reputation which "might seriously damage her standing and association in the community" nor has plaintiff been deprived of her Constitutional rights of freedom of speech since the commission's censure was rescinded.

It is clear that plaintiff has not stated a cause of action and cannot do so; thus the demurrer to the entire complaint is sustained without leave to amend.

Notice waived.

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B-227

Page 1

DEPT. 21
MINUTES ENTERED
12/23/88 200
COUNTY CLERK

APPENDIX 5

David M. Liberman
Attorney at Law
2049 Century Park East, Suite 3160
Century City, California 90067
(213) 277-9288

Attorney for Plaintiff

Filed
Aug. 31, 1988
Frank S. Zolin,
County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

STEPHANIE KENNEDY, Plaintiff, vs. COUNTY OF LOS ANGELES, a local public entity; DEANE DANA, member of the Los Angeles County Board of Supervisors; Dolores I. Nason, President of the Los Angeles County Commission on Obscenity and Pornography; FRED COHEN, JAMES MICKEY DUNLAP, Jr., HAROLD L. ELTERMAN, SUSAN FETTERS, HAZEL GEISBAUER, DR. CHARLES GREENE, and KENNETH A. MORRIS, members of the Los Angeles County Commission on Obscenity and Pornography; and DOES 1-20, Defendants.	No. C690283 FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES FOR 1. Deprivation of Civil Rights Under Color Of State Law; 2. Deprivation of Plaintiff's Rights Under The California Constitution.

FILED AUG 31 1988

I.

INTRODUCTION

1. This is a civil rights action for declaratory and injunctive relief and for damages. Plaintiff seeks to have declared unconstitutional and to enjoin enforcement of the Operating Rules Of The County Commission On Obscenity And Pornography, to the extent that such rules provide for the censure of commission members. Specifically, the "Representation" section of the Operating Rules, (attached hereto as Exhibit A) which was, and remains, in effect at all relevant times herein, prohibits members of the Los Angeles County Commission On Obscenity and Pornography (herein after the "Commission") from engaging in a personal dispute in public about any other member of the Commission, or about any issue being discussed by the Commission. The Rules subject any commission member who violates this provision to censure. Pursuant to this rule, plaintiff was censured by the Commission for exercising her constitutional right to free speech and association. This provision, on its face and as construed and applied against plaintiff by the defendants, thus deprives plaintiff and other commission members of their constitutional rights under the First and Fourteenth Amendments to the United States Constitution, and under article I, sections 1, 2, 3 and 7 of the California Constitution. Plaintiff was also dismissed from the Commission by Supervisor Deane Dana for exercising her constitutionally protected rights.

2. Plaintiff also seeks damages against the individual members of the commission and Supervisor Deane

Dana for the deliberate and malicious infringement of her constitutional rights.

II.

PARTIES

3. Plaintiff Stephanie Kennedy is a resident and citizen of Los Angeles County, California. Between February, 1984 and July, 1987, she was a duly appointed member of the Obscenity and Pornography Commission.

4. Defendant County of Los Angeles (hereinafter the "County") is now and at all times mentioned herein has been a body corporate and politic duly organized under the laws of the State of California. Defendant County is empowered to create various county commissions, and to appoint and supervise county commissioners, including those on the Obscenity and Pornography Commission, which it has created by county ordinance.

5. Defendant Deane Dana is a member of the Los Angeles County Board of Supervisors representing the Fourth District, and is vested with final authority to appoint and dismiss members of the Commission. He is sued in his individual and official capacity.

6. Defendants Dolores I. Nason, Fred Cohen, James Mickey Dunlap, Jr., Harold L. Elterman, Susan Fetters, Hazel Geisbauer, Dr. Charles Greene, and Kenneth A. Morris are duly appointed members of the Commission, which is vested with authority to legislate and implement County policy on matters of obscenity and pornography. They are sued in their individual and official capacities.

7. Defendants Does 1-20, inclusive, are sued herein under fictitious names, their true names and capacities being unknown to plaintiff at this time. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages were proximately caused by such defendants.

8. The acts and practices of the defendants, and their agents and representatives as herein alleged, were performed under color of state law and therefor constitute actions of the State within the meaning of the Fourteenth Amendment to the United States Constitution.

III.

FACTS APPLICABLE TO ALL
CLAIMS AND TO ALL DEFENDANTS

9. The Los Angeles County Commission on obscenity and Pornography was created by the County of Los Angeles by Ordinance No. 4099, Article LV, Sections 1361-1366 of the Administrative Code, October 4, 1968.

10. The purpose of the Commission is to assist the District Attorney, Sheriff, County Counsel, and the Superintendent of Schools in their campaign against publication and distribution of indecent and pornographic literature in Los Angeles County. The Commission also assists County representatives in obtaining effective State legislation in the area of pornography and obscenity and assists committees and organization and enlists public

support for legislative programs designed to regulate publishers and vendors of obscene and indecent writings.

11. Membership on the Commission consists of 15 persons appointed by the Board of Supervisors. Each of the five County Supervisors appoints three members from his or her Supervisorial District. A member's term consists of one year, beginning on May 5 of the year of appointment and expiring on May 4 of the following year, unless renewed for an additional term by the appointing Supervisor.

12. In furtherance of the authority vested in it by the County, the Commission has promulgated Operating Rules governing the conduct of Commission business and meetings. The "Representation" section of the Operating Rules states, in relevant part, that it is the policy of the Commission "that no Commissioner as a representative of the Commission will engage in a personal dispute in public about any other member of this Commission or any issue being discussed by the Commission," and that any commissioner violating this provision "will be subject to censure by the Commission."

13. In promulgating and enforcing the aforementioned rule against plaintiff as hereinafter alleged, the Commission acted in its official capacity to legislate and implement county policy, and therefore acted as part of and on behalf of defendant County.

14. In February, 1984, plaintiff was appointed to the Commission by defendant Supervisor Dana, as provided for by Los Angeles County Code section 3.44.020. Her appointment was renewed by defendant Dana for two additional terms, 1985-1986 and 1986-1987.

15. On May 28, 1987, a regularly scheduled meeting of the Obscenity and Pornography Commission was held at the Hall of Administration, 500 West Temple Street, Los Angeles, California. Present at that meeting, in addition to plaintiff, were Commission members Nason, Cohen, Greene, Elterman, Morris, Clark, Geisbauer, Dunlap, and Peterson. One of the issues at the May 28 meeting was the introduction by plaintiff of an "Emergency Resolution" regarding allegedly obscene AIDS educational material produced by the State of California which was being used in Los Angeles County schools. In connection with this issue, plaintiff had informed and invited various women's organizations, including the American Association of Women and Black Americans for Family Values, as well as members of Archbishop Mahoney's Task Force on Obscenity and Pornography, that the issue might come up at the meeting. Representatives of these groups were thus also present at the May 28 meeting, along with news reporters from local television stations, radio stations and newspapers.

16. Because the AIDS educational issue was not on the official meeting agenda, plaintiff introduced the Emergency Resolution during the Public Comments portion of the meeting. The Resolution called upon the Board of Supervisors, the District Attorney, and the Superintendent of Schools to stop the distribution of obscene AIDS educational materials in Los Angeles County classrooms. After introducing the speaking on the Emergency Resolution, plaintiff presented representatives from the American Association of Women and Black Americans for Family Values, who also spoke on the issue.

17. Although agreeing as a whole with plaintiff that the AIDS materials were obscene and action should be taken, the Commission objected to plaintiff's effort to focus media attention on the issue, and plaintiff's actions in inviting representatives from various interested organizations to attend the public meetings. Action on the Emergency Resolution was continued until the June meeting of the Commission.

18. On June 25, 1987, the obscenity and Pornography Commission again convened for a regularly scheduled meeting at the Hall of Administration. Present at this meeting were commissioners Nason, Arrington, Dunlap, Elterman, Geisbauer, Greene, Morris, Fetters, Cohen and Clark. At the meeting, at which plaintiff was not present, the Emergency Resolution was passed and referred to the Board of Supervisors.

19. Despite recognizing the merit of plaintiff's Emergency Resolution by its passage, the Commission, without either formal or informal advance notice, and without providing plaintiff with an opportunity to be heard, met in closed executive session following the public portion of the meeting and officially "censured" plaintiff for exercising her constitutional rights to introduce and speak on the Emergency Resolution, which was a matter of extreme public concern, and for inviting representatives of concerned citizens groups, as well as the media, to attend, participate in, and report on consideration of the issue by the Commission.

20. Plaintiff's first notice of the meeting and censure came when she received a correspondence from fellow commissioner Burton Arrington dated July 11, 1987.

Commissioner Arrington's letter informed plaintiff that she had been censured at what Commissioner Arrington considered an illegal meeting of the Commission.

21. Before notifying plaintiff of the censure action, Commissioner Arrington objected to the censure action to defendant Dolores Nason, President of the Obscenity and Pornography Commission, in a letter dated June 28, 1987. In response to this letter, defendant Nason referred the matter to staff advisor Barbara Chovan and to the County Counsel's office.

22. After consultation with the County Counsel's office, staff advisor Chovan recommended in a memorandum to all commissioners dated July 17, 1987, that the censure action be reconsidered at a public meeting of the Commission on July 23, 1987. The censure action was therefore placed on the agenda for that date.

23. Having received notice that the censure issue was to be reconsidered at the July 23 meeting, plaintiff retained counsel, Harland Arnold, to represent her at the meeting.

24. The July 23 meeting was attended by defendants Nason, Cohen, Elterman, Fetters, Geisbauer, and Greene, as well as nondefendants Arrington, Clark, Peterson, and plaintiff.

25. At the meeting, defendant Nason asked the censure committee for a report. At this point, commissioner Arrington objected to the entire censure action as illegal, and asked the Commission to void the June 25 executive session as though it never occurred. In response, commissioner/defendant Cohen moved that the issue be tabled.

The motion to table was passed by the Commission over plaintiff's objection.

26. During the Public Comments portion of the meeting attorney Arnold demanded that the Commission rescind the June 25 censure action as though it never happened, and declare it null and void. On the motion of commissioner Arrington, the Commission, at the insistence of plaintiff and her attorney, voted to rescind the June 25 censure.

27. Despite recision of the censure action, on July 24, 1987, plaintiff received a letter from defendant Dana dated July 22, 1987, informing her that she was dismissed from the Commission. Plaintiff is informed and believes, and thereon alleges, that she was dismissed from the Commission by defendant Dana solely for introducing and speaking on the AIDS resolution, and for providing interested organizations and the media with an opportunity to also speak on and report the issue.

IV.

CAUSES OF ACTION

First Cause of Action – Deprivation of Plaintiff's Civil Rights Under Color of State Law Against Members Of The Commission

28. Plaintiff realleges and incorporates by reference paragraphs 1 through 27, as though fully set forth herein.

29. As a citizen of the United States and as a duly appointed member of a public governmental commission, plaintiff had a fundamental right to speak on matters of public concern, to associate with other citizens and organizations sharing an interest in such issues, to publicize

her views to the community through the media, and to be free from punishment for exercising such rights without due process of law.

30. Defendants' action in censuring plaintiff, without notice or opportunity to be heard, for introducing and speaking on the AIDS resolution, for inviting interested citizens to speak on and participate in its consideration by the Commission, and for notifying the media that she was going to introduce such a resolution, subjected plaintiff to the deprivation of rights, privileges and immunities secured to her by the Constitution and laws of the United States. These rights include her rights of speech and association guaranteed by the First Amendment to the United States Constitution, and her right to not be deprived of a liberty interest without due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

31. As a direct and proximate cause of the censure action, plaintiff was forced to retain counsel in order to attempt to clear her name and repair damage to her reputation, as well as to vindicate her constitutional rights, and therefore expended attorney fees in the amount of $1,733.

32. As a further direct and proximate cause of the acts of the defendants, as herein alleged, plaintiff suffered anxiety and distress attendant to her censure, and suffered substantial damage to her reputation and standing in the community, in the amount of $50,000.

33. The aforementioned acts of the Commission defendants were willful, oppressive and malicious, and suppressed plaintiff in the exercise of her constitutional

rights. Plaintiff should therefore be awarded exemplary damages in the amount of $100,000.

34. In censuring plaintiff, defendants acted under the authority vested in them by the "Representation" section of the Operating Rules. This rule is unconstitutional on its face and as construed and applied to plaintiff's constitutionally protected expression, and defendant Commissioners should be enjoined from its future enforcement. In seeking such declaratory and injunctive relief plaintiff has no other plain, adequate or complete remedy to effectively redress the deprivation of which she complains. Any other remedies, are fraught with uncertainty and delay, and are insufficient to fully rectify the wrongs complained of herein.

Second Cause Of Action – Deprivation of Plaintiff's Civil Rights Under Color Of State Law Against Supervisor Dana.

35. Plaintiff realleges and incorporates by reference paragraphs 1 through 27, as though fully set forth herein.

36. As a citizen of the United States and as a duly appointed member of a public governmental commission, plaintiff had a fundamental right to speak on matters of public concern, to associate with other citizens and organizations sharing an interest in such issues, to publicize her views to the community through the media, and to be free from punishment for exercising such rights without due process of law. These rights also include the right to not be dismissed from a public commission for exercising her rights of free speech and association, and a liberty

interest attendant to her status as a member of the Commission to not be stigmatized by such a dismissal.

37. In dismissing plaintiff from the Commission, without notice or opportunity to be heard, for introducing and speaking on the AIDS resolution, inviting other citizens and organizations to speak on the resolution and participate in its consideration by the Commission, and for inviting the media to report on the resolution, plaintiff was deprived of rights, privileges and immunities secured to her by the Constitution and laws of the United States. These rights include freedom of speech and association guaranteed to her by the First Amendment to the United States Constitution, and her right to not be deprived of her liberty interest as a member of the Commission without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

38. As a direct and proximate cause of the acts of defendant Dana, as herein alleged, plaintiff suffered anxiety and distress attendant to her dismissal, and suffered substantial damage to her reputation and standing in the community, in the amount of $50,000.

39. The aforementioned acts of the defendant were willful, oppressive and malicious, and suppressed plaintiff in the exercise of her constitutional rights. Plaintiff should therefore be awarded exemplary damages in the amount of $100,000.

Third Cause of Action – Deprivation of Civil Rights Under Color of State of State Law Against The County Of Los Angeles

40. Plaintiff realleges and incorporates by reference paragraphs 1 through 27, 29, 30, 33, 35 and 36, as though fully set forth herein.

41. In doing the acts complained of herein, defendants Dana and members of the Commission were acting as part of and on behalf of defendant County of Los Angeles. Defendants' conduct thus occurred in execution of a policy promulgated and carried out by County lawmakers, or by those whose edicts or acts represent official County policy.

42. In censuring and dismissing plaintiff from her position as a member of the Commission for the acts previously described, without notice or opportunity to be heard, the County deprived plaintiff of rights, privileges and immunities secured to her by the Constitution and the laws of the United States. These rights include freedom of speech and association guaranteed to her by the First Amendment to the United States Constitution, and her right to not be deprived of liberty without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

43. As a direct and proximate cause of the censure action, plaintiff was forced to retain counsel in order to attempt to clear her name and repair damage to her reputation, as well as to vindicate her constitutional rights, and therefore expended attorney fees in the amount of $1,733.

44. As a further direct and proximate cause of the acts of the defendants as herein alleged, plaintiff suffered anxiety and distress attendant to her censure, and suffered substantial damage to her reputation and standing in the community, in the amount of $50,000.

45. In censuring plaintiff, defendants acted under the authority vested in them by the "Representation" section of the Operating Rules. This rule is unconstitutional on its face and as construed and applied to plaintiff's constitutionally protected expression, and defendant County should be enjoined from its future enforcement. In seeking such declaratory and injunctive relief plaintiff has no other plain, adequate or complete remedy to effectively redress the deprivation of which she complains. Any other remedies are fraught with uncertainty and delay, and are insufficient to fully rectify the wrongs complained of herein.

Fourth Cause Of Action – Deprivation of Plaintiff's Rights To Freedom Of Speech, Association And Due Process Of Law Under The California Constitution Against Defendant Members Of The Commission.

46. Plaintiff realleges and incorporates by reference paragraphs 1 through 27, as though fully set forth herein.

47. As a citizen of the State of California and as a duly appointed member of a public governmental commission, plaintiff had a state constitutional right to speak on matters of public concern, to associate with other citizens and organizations sharing an interest in such issues, to publicize her views to the community through the media, and to be free from punishment for exercising such rights without due process of law.

48. Defendants' action in censuring plaintiff, without notice or opportunity to be heard, for introducing and speaking on the AIDS resolution, for inviting interested citizens to speak on and participate in its consideration by the Commission, and for notifying the media that she was going to introduce such a resolution, subjected plaintiff to the deprivation of rights secured to her by article I, sections 1, 2, 3 and 7 of the California Constitution.

49. As a proximate result of the acts of the defendants, as herein alleged, plaintiff was compelled to secure the services of an attorney to defend herself against the unwarranted censure action, in order to attempt to clear her name and defend her reputation and standing in the community, and incurred attorney fees and costs in the amount of $1,733.

50. As a further proximate result of the acts of the defendants, as herein alleged, plaintiff suffered anxiety and distress attendant to her censure, and suffered substantial damage to her reputation and standing in the community, in the amount of $50,000.

51. The aforementioned acts of the defendants were willful, oppressive and malicious, and suppressed plaintiff in the exercise of her constitutional rights. Plaintiff should therefore be awarded exemplary damages in the amount of $100,000.

52. In censuring plaintiff, defendants acted under the authority vested in them by the "Representation" section of the Operating Rules. This section should be declared unconstitutional on its face and as construed and applied to plaintiff's constitutionally protected expression, and enjoined from future enforcement. In

seeking such relief, plaintiff has no other plain, adequate or complete remedy to effectively redress her deprivation, other than declaratory and injunction action. Any other remedies are fraught with uncertainty and delay, and are insufficient to fully rectify the wrongs complained of herein.

Fifth Cause Of Action – Deprivation Of Plaintiff's Rights To Freedom Of Speech, Association And Due Process of Law Under The California Constitution Against Supervisor Deane Dana.

53. Plaintiff realleges and incorporates by reference paragraphs 1 through 27, as though fully set forth herein.

54. As a citizen of the State of California and as a duly appointed member of a public governmental commission, plaintiff had a state constitutional right to speak on matters of public concern, to associate with other citizens and organizations sharing an interest in such issues, to publicize her views to the community through the media, and to be free from punishment for exercising such rights without due process of law. These rights also include the right to not be dismissed from a public commission for exercising her constitutionally protected rights to speech and association, and a liberty interest attendant to her status as a county commissioner to not be stigmatized by such dismissal.

55. In dismissing plaintiff from the Commission, without notice or opportunity to be heard, for introducing and speaking on the AIDS resolution, inviting other citizens and organizations to speak on the resolution and participate in its consideration by the Commission, and for inviting the media to report on the resolution, plaintiff

was deprived of rights guaranteed to her by article I, sections 1, 2, 3, and 7 of the California Constitution.

56. As a proximate result of the acts of the defendant, as herein alleged, plaintiff suffered anxiety and distress attendant to her censure, and suffered substantial damage to her reputation and standing in the community, in the amount of $50,000.

57. The aforementioned acts of the defendant were willful, oppressive and malicious, and suppressed plaintiff in the exercise of her constitutional rights. Plaintiff should therefore be awarded exemplary damages in the amount of $100,000.

Sixth Cause Of Action – Deprivation of Plaintiff's Rights To Freedom Of Speech, Association and Due Process Of Law Under The California Constitution Against The County Of Los Angeles.

58. Plaintiff realleges and incorporates by reference paragraphs 1 through 27, 29, 30, 33, 35 and 36, as though fully set forth herein.

59. In doing the acts set forth above, defendants Dana and members of the Commission were acting as part of and on behalf of defendant County of Los Angeles. Defendants' conduct thus occurred in execution of a policy promulgated and carried out by County lawmakers, or by those whose edicts or acts represent official County policy.

60. In censuring and dismissing plaintiff from her position as county commissioner for the acts previously described, without notice or opportunity to be heard, the County deprived plaintiff of rights secured to her by

article I, sections 1, 2, 3, and 7 of the California Constitution.

61. As a proximate result of the acts of the defendant, as herein alleged, plaintiff was compelled to secure the services of an attorney to defend herself against the unwarranted censure action, and incurred attorney fees and costs in the amount of $1,733.

62. As a further proximate result of the acts of the defendants, as herein alleged, plaintiff suffered anxiety and distress attendant to her censure, and suffered substantial damage to her reputation and standing in the community, in the amount of $50,000.

63. In censuring plaintiff, defendants acted under authority vested in them by the "Representation" section of the Operating Rules, which is official policy of the County, and which is unconstitutional on its face and as construed and applied to plaintiff. The "Representation" section should be declared unconstitutional and the County enjoined from its future enforcement against plaintiff or any other commissioner. In seeking such relief plaintiff has no other plain, adequate or complete remedy to effectively redress the Rule's unconstitutionality. Any other remedy is insufficient to fully rectify plaintiff's constitutional deprivation.

V.

RELIEF

WHEREFORE plaintiff prays that the Court grant relief as follows:

1. Declare the "Representation" section of the Operating Rules Of The Commission On Obscenity And Pornography unconstitutional on its face and as applied to plaintiff's constitutionally protected expression;

2. Issue an order permanently enjoining the defendants, their agents, employees, attorneys, and all other persons acting in concert with them, from future enforcement of the "Representation" section of the Operating Rules;

3. Award compensatory damages to plaintiff in the amount of $1,733 for the attorney fees which she expended in protecting her constitutional rights against the censure action;

4. Award compensatory damages to plaintiff in the the [sic] amount of $100,000 against defendants Commission and County for the loss of her state and federal constitutional rights, and general damages attendant thereto;

5. Award compensatory damages to plaintiff in the amount of $100,000 against defendant Dana for the loss of her state and federal constitutional rights, and general damages attendant thereto;

6. Award exemplary and punitive damages in the amount of $200,000 against defendant members of the Commission;

7. Award exemplary and punitive damages in the amount of $200,000 against defendant Dana;

8. Grant costs of suit herein;

9. Award attorney fees to plaintiff; and

10. Grant such other relief as the Court deems just and proper.

Dated: August 31, 1988

/s/ David M. Liberman
David M. Liberman
Attorney for Plaintiff

VERIFICATION

I, STEPHANIE KENNEDY, am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 31, 1988, at Los Angeles, California.

/s/ Stephanie Kennedy
STEPHANIE KENNEDY

EXHIBIT A

OPERATING RULES OF THE COUNTY COMMISSION ON OBSCENITY AND PORNOGRAPHY

Rotation of Ghair [sic]

In the absence of the President and Vice-President, regular meetings will be convened and presided over by the Secretary.

Absence

It is the duty of each Commissioner to inform staff when he/she is unable to attend a meeting.

Meeting Time

Meetings shall be convened promptly at 9:30 a.m. When a quorum is not present, the order of the agenda will be altered to begin with items which do not require action by the Commission.

Meetings shall adjourn at 11:30 a.m. unless a majority of the Commission agrees to continue. Staff or the President can change the meeting time to earlier or later if the agenda so dictates.

Agenda Formulation

Items may be placed on the agenda in the following manner:

1. By order of the Commission documented in the Minutes.
2. By advance request of a person, or organization with the approval of the President.
3. By advance request of a Commissioner with the approval of the President.
4. Wherever possible, agenda items shall be presented with documentation when mailed.
5. Matters which do not appear on the agenda may not be acted upon by the Commission unless it is an emergency matter. An emergency matter shall be

defined as one with a time limit shorter than the next regular meeting.

Representation

When speaking in public, Commissioners shall *make it clear* whether statements reflect individual or Commission positions.

When members officially represent the Commission, they shall report to the Commission within three weeks.

The Commission shall be informed of all standing and short-term representation by Commissioners to outside groups; relating to commission concerns.

It shall be the policy of this Commission that no Commissioner as a representative of the Commission will engage in a personal dispute in public about any other member of this Commission or any issue being discussed by the Commission. There are, and will continue to be, differences of opinion on the myriad of issues the Commission considers and that is as it should be. Such behavior will be subject to censure by the Commission.

Correspondence

Commission letterhead shall be used only for authorized business. Correspondence shall be directed through the staff, except as designated by the Commission or in the couurse [sic] of approved work programs of the Commission; i.e., task force Chairpersons. Copies shall be sent immediately to the office if not prepared by the staff.

Individual Commissioners may use letterhead for Commission/Committee related matters. Letterhead may not be used to:

1. Correspond with legislators advocating a position on proposed or pending legislation.
2. Correspond with persons campaigning for elective office.
3. Imply Commission policy or action when none exists.

When the letterhead is used for the purpose of expressing the writer's opinion, the content of the letter must clearly indicate that it is in the opinion of the writer and in no way reflects the Commission or the County policy.

Publicity

Releases to the press and other mass media issued in the name of the Commission shall be coordinated through the staff.